



**State of Idaho**

**DEPARTMENT OF WATER RESOURCES**

1301 North Orchard Street, P.O. Box 83720, Boise, Idaho 83720-0098

Phone: (208) 327-7900 FAX: (208) 327-7866

DIRK KEMPTHORNE  
GOVERNOR

KARL J. DREHER  
DIRECTOR

April 28, 2000

Water Users & Water Right Holders:  
Warm Springs Creek & Tributary  
Water District 34

Re: Requiring measuring devices and controlling works on Warm Springs Creek and  
tributaries, part of Water District 34

Dear Water Right Holder(s):

The Department of Water Resources (the department) has issued the enclosed preliminary order. Pursuant to Section 67-5243, Idaho Code, it can and will become a final order without further action of the Department unless a party petitions for reconsideration or files an exception and/or brief as described in the enclosed information sheet.

Please note that water right owners are required to report any change of water right ownership and/or change of mailing address to the department within 120 days of the change. Failure to report these changes could result in a \$100 late filing fee. Contact any office of the department or visit the department's homepage on the Internet to obtain the proper reporting form.

If you have any questions, please call Tim Luke or me at (208) 327-7907.

Sincerely,

Dayna M. Ball  
Office Specialist II  
Water Distribution Section

Enclosures

Cc: Regional Office  
Doug Rosenkrance,  
Water Master WD34

BEFORE THE DEPARTMENT OF WATER RESOURCES  
OF THE  
STATE OF IDAHO

IN THE MATTER OF REQUIRING MEASURING DEVICES	)	
	)	
AND CONTROLLING WORKS ON WARM SPRINGS CREEK	)	PRELIMINARY
	)	ORDER
AND TRIBUTARIES, PART OF WATER DISTRICT 34	)	
	)	

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Upon receipt of a petition from a water right holder on Warm Springs Creek requesting the Department to enforce its order of March 4, 1991 requiring various diversions in Water District 34 located upstream of Mackay Reservoir to install measuring devices and controlling works, and after consultation with the Watermaster of Water District 34, and a field inspection by IDWR staff, the Department finds that inadequate measuring devices and lockable controlling works presently exist on Warm Springs Creek and tributaries in Water District 34. Section 42-701, Idaho Code, provides:

**42-701. INSTALLATION AND MAINTENANCE OF CONTROLLING WORKS AND MEASURING DEVICES BY WATER APPROPRIATORS - PROCEDURE UPON FAILURE TO INSTALL AND MAINTAIN - MEASURING AND REPORTING OF DIVERSIONS - PENALTY FOR FAILURE TO COMPLY - REPORT FILING FEE.**

(1) The appropriators or users of any public waters of the state of Idaho shall maintain to the satisfaction of the director of the department of water resources suitable headgates and controlling works at the point where the water is diverted. Each device shall be of such construction that it can be locked and kept closed by the watermaster or other officer in charge, and shall also be of such construction as to regulate the flow of water at the diversion point. Each such appropriator shall construct and maintain, when required by the director of the department of water resources, a rating flume or other measuring device at such point as is most practical in such canal, ditch, wellhead or pipeline for the purpose of assisting the watermaster or department in determining the amount of water that may be diverted into said canal, ditch, wellhead or pipeline from the stream, well or other source of public water. Plans for such headgates, rating flumes or other measuring devices shall be approved by the department of water resources.

(3) Any appropriator or user of the public waters of the state of Idaho that neglects or refuses to construct or maintain such headgates, controlling works, or measuring devices..., upon receiving ten (10) days' notice from the director of the department of water resources within which to begin and diligently pursue to completion the construction or installation of the required device or devices or to begin and diligently pursue to completion a remedy to such defects as


exist in accordance with said notice, then the director of the department of water resources may order the duly qualified and acting watermaster of the water district to shut off and refuse to deliver at the point of diversion, the water owned by such appropriator or user until the user does construct and maintain such headgates, controlling works or measuring devices or remedy the defects which exist or the director may take action pursuant to section 42-1701B, Idaho Code, to enforce the requirement to construct, install or maintain such devices.

(4) The appropriators or users of the public waters of the state of Idaho shall be given a reasonable time within which to complete construction of such headgates, controlling works or measuring devices, depending upon the size and extent thereof, when due diligence has been used in the prosecution of such work.

THEREFORE IT IS HEREBY ORDERED THAT:

1. Those water users identified in Attachment A of this order diverting water from Warm Springs Creek and tributaries shall install measuring devices and lockable controlling works of a type acceptable to the Department prior to July 1, 2000.
2. Those water users with non-consumptive diversions that are used solely for fish propagation purposes are required to install measuring devices but are exempt from the requirement to install lockable controlling works.
3. The watermaster shall shut off and refuse to deliver water from Warm Springs Creek and tributaries to any water user identified in Attachment A who does not have adequate lockable controlling works and a measuring device after July 1, 2000.

Dated this 20<sup>TH</sup> day of April, 2000

  
NORMAN C. YOUNG  
ADMINISTRATOR

Attachment A

CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that on this 28<sup>th</sup> day of April, 2000, the above PRELIMINARY ORDER was served upon the following individuals by placing a copy of the same in the United States Mail, postage prepaid and properly addressed as follows:

Rec'd 5/1/00  
Robert Unger  
24121 SW Newland Rd.  
Wilsonville, Or 97070-6705

Rec'd 5/3/00  
Bar Horseshoe Cattle & Livestock Co.  
C/O David Stoecklein  
PO Box 856  
Ketchum, Id 83340

Rec'd 5/4/00  
Churn Dasher Ranch  
Scott Johnson  
5366 Fish Hatchery Rd.  
Mackay, Id 83251

Rec'd 5/11/00  
Melvin R Freeman  
7952 S Wilson St  
Midvale, Ut 84047

Rec'd 5/11/00  
Mark T Gates Trustee  
700 Emerson St  
Palo Alto, Ca 94301

Rec'd 5/11/00  
Gordon C Harris  
Star Route  
Mackay, Id 83251

Rec'd 5/14/00  
Idaho Cowboy In An Idaho Corp  
C/O Grogan Graffam McGinley & Lucchino  
3 Gateway Center 22<sup>nd</sup> Floor  
Pittsburgh, Pa 15222-1009

Rec'd 5/25/00  
Pernecy D Kent  
PO Box 365  
Mackay, Id 83251

Rec'd 5/28/00  
Lynn D Reno  
9417 Eucalyptus Dr  
Bakersfield, Ca 93306

Rec'd 5/18/00  
Patricia & Richard Smith  
5797 W 5000 N  
Mackay, Id 83251

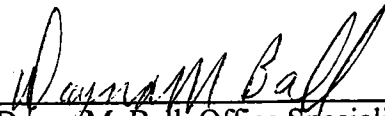
Rec'd 5/13/00  
State of Idaho Dept of Fish & Game  
PO Box 25  
Boise, Id 83707

Rec'd 5/11/00  
Walter Stoecklein  
PO Box 856  
Ketchum, Id 83340

Rec'd 5/18/00  
Ward W Woods  
C/O Mark T Gates  
700 Emerson St  
Palo Alto, Ca 94301

Rec'd 5/14/00  
Broken River Ranch  
C/O Roy Crawford  
165 Phillips Rd.  
Woodside, Ca 94062

Rec'd  
6X Ranch LLC  
PO Box 12625  
Fresno, Ca 93778

  
Dayna M. Ball, Office Specialist II  
Water Distribution Section

## **Responding to Preliminary Orders Issued by the Idaho Department of Water Resources**

The Idaho Department of Water Resources (Department) issues water right permits, licenses, and transfers as preliminary orders pursuant to section 67-5243, Idaho Code. A preliminary order can and will become a final order without further action of the department unless a party petitions for reconsideration or files an exception and/or brief as further described below.

### **PETITION FOR RECONSIDERATION**

Any party may file a petition for reconsideration of a preliminary order with the Department within fourteen (14) days of the service date of the order. The Department will act on a petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law. See section 67-5243(3), Idaho Code.

### **EXCEPTIONS AND BRIEFS**

Within fourteen (14) days after (a) the service date of a preliminary order, (b) the service date of a denial of a petition for reconsideration from this preliminary order, or (c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration from a preliminary order, any party may in writing support or take exceptions to any part of a preliminary order and may file briefs in support of the party's position on any issue in the proceeding. Otherwise, a preliminary order will become a final order of the Department.

If any party appeals or takes exceptions to a preliminary order, opposing parties shall have fourteen (14) days to respond to any party's appeal. Written briefs in support of or taking exceptions to the preliminary order shall be filed with the Department. The Department retains the right to review the preliminary order on its own motion.

### **CERTIFICATE OF SERVICE**

All documents intended to be part of the Department record in connection with a preliminary order shall be served upon the representatives of each party of record. Every document filed with and intended to be part of the agency record must be attached to or accompanied by proof of service by the following or similar certificate.

I HEREBY CERTIFY (swear or affirm) that I have this day of \_\_\_\_\_, served the foregoing (name(s) of document(s)) upon all parties of record in this proceeding, (by delivering a copy thereof in person: (list names)) (by mailing a copy thereof, properly addressed with postage prepaid, to: (list names)).  
(Signature)

## **ORAL ARGUMENT**

If the Department grants a petition to review a preliminary order, the Department shall allow all parties an opportunity to file briefs in support of or taking exceptions to the preliminary order and may schedule oral argument in the matter before issuing a final order. If oral arguments are to be heard, the Department will within a reasonable time period notify each party of the place, date and hour for the argument of the case.

## **FINAL ORDER**

The Department will issue a final order within fifty-six (56) days of receipt of the written briefs, oral argument or response to briefs, whichever is later, unless waived by the parties or for good cause shown. The Department may remand the matter for further evidentiary hearings if further factual development of the record is necessary before issuing a final order. The Department will serve a copy of the final order on all parties of record.

Unless a different date is stated in a final order, the order is effective fourteen (14) days after its issuance if a party has not filed a petition for reconsideration. If a party has filed a petition for reconsideration with the agency head, the final order becomes effective when (a) the petition for reconsideration is disposed of; or (b) the petition is deemed denied because the agency head did not dispose of the petition within twenty-one (21) days.

## **RIGHT TO HEARING**

Pursuant to Section 42-1701A(3), Idaho Code, unless the right to a hearing before the Department is otherwise provided by statute, any person aggrieved by any decision, determination, order, or action of the Department or any applicant for any permit, license, certificate, approval, registration, or similar form of permission required by law to be issued by the Department, who is aggrieved by a denial or conditional approval ordered by the Department, and who has not previously been afforded an opportunity for a hearing on the matter shall be entitled to a hearing before the Department to contest the denial or conditional approval upon filing with the Department, within fifteen (15) days after receipt of the denial or conditional approval, a written permission stating the grounds for contesting the action by the director and requesting a hearing.

## **APPEAL OF FINAL ORDER TO DISTRICT COURT**

If a preliminary order becomes final, any party aggrieved by the final order or orders previously issued in the case may appeal the final order and all previously issued orders in this case to district court by filing a petition in the district court of the county in which (a) a hearing was held, or (b) the final agency action was taken, or (c) the party seeking review of the order resides, or (d) the real property or personal property that was the subject of the agency action is located. The appeal must be filed within twenty-eight (28) days of this preliminary order becoming final. The filing of an appeal to district court does not itself stay the effectiveness or enforcement of the order under appeal. See Sections 67-5270 through 67-5273, Idaho Code.